



SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1939

No. **1033** 95

HUMBLE OIL & REFINING COMPANY, ET AL.,
Petitioners

VS.

W. C. TURNBOW, ET AL.

**Brief of Respondents, W. C. Turnbow, W. C. Turn-
bow Petroleum Corporation and the Railroad
Commission of Texas in Opposition to
the Petition for Writ of Certiorari**

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**TO THE HONORABLE THE SUPREME COURT OF THE
UNITED STATES:**

I.

Additional Statement

Respondents, W. C. Turnbow, W. C. Turnbow Petroleum Corporation, and the Railroad Commission of Texas, submit the following additional and corrective statement:

1. The material facts involved in this case appear in the opinion of the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas (R. 353). This case is reported in 133 S. W. (2d) 191. The findings of fact made by the Commission in its order here under attack are set forth in said opinion (R. 354, 355), and the Court found in its opinion that the Railroad Commission of Texas, the administrative body, had held four hearings with respect to the two wells or permits in question, and that on the last hearing before the Railroad Commission of Texas, on September 23, 1937, the petitioners in this court, Humble Oil and Refining Company and Gulf Oil Corporation, requested the Commission to consider and the Commission considered, all the records and evidence before it on the three previous hearings, and also received much evidence on both the issue of confiscation and the issue of waste, and that in the trial court, on appeal from the Commission order granting the permits pursuant to said hearing on September 23, 1937, the petitioners in this court introduced a complete transcript of all proceedings and evidence had and adduced on the four hearings before the Commission, and also introduced the testimony of two expert geologists, which, on the whole, was merely contradictory of, or in conflict with, the testimony of the two expert geologists who testified on the last two hearings before the Commission. (R. 356, 357.) The testimony of the expert witnesses before the Railroad Commission of Texas, the administrative body issuing the order complained of by petitioners (R. 239-270A, 308-343), was referred to and discussed by the Court of Civil Appeals

in and for the Third Supreme Judicial District of Texas in its opinion (R. 357), and this testimony supports the findings of fact made by the Commission as a basis for its order.

Petitioners do not assail in their petition for writ of certiorari the fact findings made by the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas in the instant case.

The findings of said Court of Civil Appeals, its opinion and judgment (R. 353, 358) were approved by the action of the Supreme Court of Texas in refusing writ of error (R. 368, 369); Art. 1728, 1925 Revised Civil Statutes of Texas, as amended by Acts 1927, 40th Legislature, p. 214, ch. 144, sec. 1.

2. Petitioners apply to this court for a writ of certiorari directed to the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas to review a judgment of said court, dated October 18, 1939. The record shows that petitioners on November 2, 1939, filed their motion for rehearing and Request for Findings of Fact and Conclusions of Law in said Court of Civil Appeals (R. 358, 364), and that said court entertained and overruled said motion on November 15, 1939 (R. 365); that petitioners thereafter and on December 15, 1939, filed their petition to the Texas Supreme Court for a writ of error (R. 365) and that same was entertained and refused on January 3, 1940.

Petitioners concede in their petition for writ of certiorari to this court (page 5) that this case was one within the appellate jurisdiction of the Texas

Supreme Court under and by virtue of Article 1728 of the Civil Statutes of Texas.

Article 1728, 1925 Revised Civil Statutes of Texas, as amended by Acts of 1927, 40th Legislature, page 214, chapter 144, section 1, confers on the Supreme Court of Texas appellate jurisdiction co-extensive with the limits of the state, extending to all questions of law when same have been brought to the Court of Civil Appeals from final judgments of trial courts in cases of this character, and said article further provides that:

“In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction.”

The action of the Supreme Court in refusing writ of error being an approval by the Supreme Court of Texas both of the judgment and opinion of the Court of Civil Appeals, said action operates as and is an affirmance of the judgment and decision of the Court of Civil Appeals, and the Supreme Court of Texas is the highest court of the state in which a decision could be had and a writ of certiorari may not be directed to the intermediate appellate court.

II.

Summary of Argument

1. Petitioners were not denied the equal protection of the law and deprived of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States because it affirmatively appears both from the record and petitioners' petition for writ of certiorari herein that petitioners were accorded a full hearing before the administrative body and that the action of the administrative body was supported by substantial evidence.

2. The Supreme Court of Texas, having refused petitioners' application for writ of error in this cause, which said refusal is by virtue of the statutes of the State of Texas an approval both of the judgment and decision and opinion of the Court of Civil Appeals, is the highest court of the state in which a decision could be had, and a writ of certiorari may not be directed to the Court of Civil Appeals, an intermediate appellate court.

Argument

Point One

Petitioners were not denied the equal protection of the law and deprived of their property without due process of law in violation of Fourteenth Amendment to the Constitution of the United States because it affirmatively appears both from the record

and petitioners' petition for writ of certiorari herein that petitioners were accorded a full hearing before the administrative body and that the action of the administrative body was supported by substantial evidence.

Jurisdiction of this court is attempted to be invoked on the ground that there is a substantial federal question involved, that petitioners are being deprived of their property without due process of law. The record shows and the petitioners admit in their petition for writ of certiorari herein that there has been a full hearing before the Railroad Commission of Texas, the administrative body issuing the order complained of, upon notice, at which hearing petitioners' evidence was received and weighed, and that after the Commission promulgated the order complained of, they had, on their own petition, a judicial hearing, at which hearing a complete transcript of the proceedings and evidence had and adduced on the four hearings before the Railroad Commission of Texas was introduced in evidence. Petitioners do not assert or contend that the fact findings made by the Commission in the order under attack were not supported by substantial evidence before the Commission, and the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas, in the opinion complained of by petitioners, found that the findings of the Commission were supported by substantial evidence. This procedure clearly satisfies the demands of the Federal Constitution and there was no lack of due process. *United Gas Public Service Company v. State of Texas*, 303

U. S. 123, 138, 139. *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 139, 59 S. Ct. 754, 761; *Railroad Commission of Texas, et al., v. Rowan & Nichols Oil Company*, — U. S. —, not yet reported, opinion delivered June 3, 1940.

Petitioners cite in support of their petition for writ of certiorari *Railroad Commission, et al., v. Rowan & Nichols Oil Company*, 107 Fed. (2d) 70 (Circuit Court of Appeals, 5th Circuit) and the opinion of the United States District Court in said case reported in 28 Fed. Supp. 131. This court by its opinion in this case delivered June 3, 1940, reversed the judgment and decision of the Circuit Court of Appeals and of the United States District Court, and held that a controversy such as the one under consideration always called for a fresh reminder that courts must not substitute their notions of expediency and fairness for those which guided the agencies to whom the formulation and execution of policy have been entrusted and that

“ * * * Certainly in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment. Compare *S. C. Hwy. Dept. v. Barnwell Bros.*, 303 U. S. 177, 191, et seq.”

In the instant case the order of the Railroad Commission of Texas complained of by petitioners (R. 347) was rendered after a full hearing, upon notice

(R. 307), and the testimony and argument was preserved in a written record (R. 308). The administrative agency found it necessary to decide, and did decide, the fact question in a substantially judicial manner, and the fact findings made by the Commission were amply supported by the evidence.

Due process does not require in such a case a review of the administrative fact determinations on new and independent evidence, as all needful protection to rights adversely affected is given by a review proceeding in the nature of an appeal. The scope of the review proceeding in the courts on appeal from an order of the Railroad Commission in a matter of this kind is clearly set forth in the opinion by Mr. Justice Critz of the Texas Supreme Court in *Gulf Land Company vs. Atlantic Refining Company*, 134 Tex. 59, 131 S. W. (2d) 73, 82, 85, wherein it is stated:

"To our minds, the law contemplates that the fact findings made by the Commission in passing upon such applications are subject to review and correction by the courts only to the limited extent hereinafter stated. The court, on appeal from the Commission order, should not set aside an order of the Commission either granting or refusing to grant a well permit unless such order is illegal, unreasonable, or arbitrary. In so far as the fact findings upon which the order is based are concerned, the order is not illegal, unreasonable, or arbitrary if it is reasonably supported by substantial evidence. Stated in another way, the court does not act as an administrative body to determine whether or not it would have reached the same fact conclusion that the Commission reached, but will consider only whether the action of the Commission in its determination of the

facts is reasonably supported by substantial evidence. 34 Tex. Jur., p. 712, sec. 11, and authorities cited. To permit the court to substitute its fact findings on controverted issues of fact in such instances would add nothing of value to the administration of the law or the rule under discussion, but, to the contrary, would destroy all uniformity of Commission administration thereunder."

"* * *

"In deciding the issue of granting or refusing a well permit as an exception to Rule 37 to prevent waste, the Commission should be left reasonably free to exercise its sound judgment and discretion. The Commission should bear in mind, however, that it is its duty to conserve oil and gas above ground as well as below. In administering our oil and gas conservation statutes, the Commission must be fair, and must not indulge in unreasonable discriminations between different oil fields, or between different tracts of land in the same field. In determining the issue of fairness or discrimination, some latitude must be allowed, because the subject of administration is so vast, complex, and complicated that its administrative agency cannot be placed in an absolute strait jacket. * * *"

We submit that the inquiry in the courts in the instant case was whether there was any substantial evidence to sustain the action of the administrative body in granting the permits under attack and that the record of the proceedings before the Railroad Commission, which was introduced in evidence by petitioners in the trial court, was sufficient to justify the Commission in drawing the conclusions that it did, and it was affirmatively found both by the trial court and the intermediate appellate court, the Court

of Civil Appeals, that the evidence before the Commission as contained in such record was amply sufficient to support the Commission's findings. Petitioners were not deprived of due process by the procedure followed in this case.

Point Two

The Supreme Court of Texas, having refused petitioners' application for writ of error in this cause, which said refusal is by virtue of the statutes of the State of Texas an approval both of the judgment and decision and opinion of the Court of Civil Appeals, is the highest court of the state in which a decision could be had, and a writ of certiorari may not be directed to the Court of Civil Appeals, an intermediate appellate court.

Article 1728, 1925 Revised Civil Statutes of Texas, as amended by Acts of 1927, 40th Legislature, p. 214, ch. 144, Sec. 1, provides among other things that the Supreme Court of Texas shall have appellate jurisdiction coextensive with the limits of the State, extending to all questions of law when same have been brought to the Court of Civil Appeals from final judgment of trial courts in certain named instances. The appellate jurisdiction is expressly vested in the Supreme Court in all cases in which the Railroad Commission of Texas is a party.

Said article further provides:

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are

correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction."

The action of the Supreme Court of Texas in refusing an application for writ of error, as in the instant case, is an affirmance of the judgment of the intermediate state court, the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas, and the Supreme Court by its judgment refusing the application for writ of error by virtue of the provisions of Article 1728, as amended by Acts of the 40th Legislature, *supra*, approved and upheld not only the judgment of said Court of Civil Appeals, but the opinion of the court as well.

In view of the positive and direct declaration of the Texas statutes, the action of the Supreme Court of Texas in refusing petitioners application for writ of error was an affirmance of the judgment and decision of the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas in the instant case, and the petition for writ of certiorari is required to be directed to the Supreme Court of Texas.

This court has held that where the state court of last resort is vested with appellate jurisdiction to review the judgment of an intermediate appellate court, and has declined to grant the writ, this court will accept the interpretation of the state court of last resort as to whether the denial of writ amounts

to a total *refusal to exercise jurisdiction*, or whether it constitutes in effect an actual exercise of such jurisdiction, and is tantamount to an *affirmance* of the intermediate appellate court's judgment without written opinion. In the latter event, the appeal properly lies from the judgment of the state court of last resort and not from that of the intermediate appellate court.

Matthews v. Huwe, 269 U. S. 262-266, 70 L. Ed. 266;

Tumey v. State of Ohio, 273 U. S. 510, 515, 71 L. Ed. 749;

Van Huffel v. Harkelrode, 284 U. S. 225, 230, 231, 76 L. Ed. 256;

Whitfield v. Ohio, 297 U. S. 431, 435, 80 L. Ed. 778, 782.

The present law conferring jurisdiction upon the Supreme Court of Texas to review judgments of the Courts of Civil Appeals by writ of error is embraced in Article 1728 of the Revised Civil Statutes of Texas, 1925 Revision, as amended by Act of 1927.

In *Hamilton v. Empire Gas & Fuel Company*, by Section B of the Commission of Appeals of Texas, an auxiliary of the Supreme Court, opinion adopted by the Supreme Court (Dec. 8, 1937), 110 S. W. (2d) 561, the court held:

"The Supreme Court's refusal of the application for writ of error manifested its approval of the construction placed by the Court of Civil Appeals upon Article 1923 and of the decision of that court that the term of the district court was not legally extended by the order made by Judge Hurst. Article

1728, R. S. 1925, as amended by chapter 144, Acts Regular Session, 40th Legislature (1927), Vernon's Ann. Civil St., art. 1728.

"The refusal of the application for writ of error in Clayton v. Jobe, supra, evidenced also the approval of the decision of the Court of Civil Appeals therein that article 200a does not authorize the extension of a term of district court for the conclusion of the trial of a particular case but has application only to the extension of the term generally for the disposition of pending business."

Respondents, W. C. Turnbow, W. C. Turnbow Petroleum Corporation and the Railroad Commission of Texas, pray that the petition for writ of certiorari to the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas be denied.

Respectfully submitted,

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